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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRAFIGURA BEHEER B.V.,

Plaintiff-Appellant,

- against -

M/T PROBO ELK, HER ENGINES, TACKLE, APPAREL, etc., IN REM PROBO ELK SHIPPING, INC., LAURIN TANKERS AMERICA, INC.,

Defendants-Appellees.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it proper for The United States Court of Appeals for the Fifth Circuit to affirm a judgment of the District Court which dismissed an admiralty action on the grounds that a foreign forum selection clause deprived it of jurisdiction where a Letter of Undertaking not only consented to the jurisdiction of the District Court, but also only made "reservation .....of *all other defenses and objections*"?

2. Was it proper for The United States Court of Appeals for the Fifth Circuit to affirm a judgment of the District Court which dismissed an admiralty action on the grounds that a foreign forum selection clause deprived it of jurisdiction where the foreign forum selection clause was contained in a charter party and the action that was dismissed involved a *non charter party dispute* for the cost of additional carriage?

3. Was it proper for The United States Court of Appeals for the Fifth Circuit to refuse to consider that under English Law, which expressly governed the charter party containing the foreign forum selection clause, the fact that the foreign forum selection clause was *not* incorporated in the operative bill of lading prevented an English Court from obtaining jurisdiction merely because this argument was not raised until appeal?

4. Was it proper for The United States Court of Appeals for the Fifth Circuit to ignore the repeated arguments made by the Plaintiff in the District Court and on appeal that the *charter party, which only*

governed transportation from Algeria to Rotterdam, had ceased to exist and no longer governed the rights of the parties when the *M/T Probo Elk* was in Houston and the subject Letter of Undertaking was issued.

RULE 14.1 (b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this Petition is as follows:

Plaintiff-Appellant and Petitioner: Trafigura-Beheer B.V.

Defendants-Appellees: N/T Probo Elk, Her Engines, Tackle, Apparel, etc., In Rem; Probo Elk Shipping, Inc., Laurin Tankers America, Inc.

RULE 29.6 STATEMENT

The Plaintiff-Appellant, Trafigura Beheer B.V., is a privately held Company in The Netherlands.

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PETITION FOR A WRIT OF CERTIORARI

Trafigura Beheer B.V. ("Trafigura") respectfully petitions for a Writ of Certiorari to review the opinion and judgment of The United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Fifth Circuit is dated July 16, 2007 and is reproduced herein at App. A.

The Memorandum Opinion and Order of The United States District Court for the Southern District of Texas, Houston Division, wherein the Court Ordered that Defendants' Motion to dismiss the Complaint be granted is dated May 2, 2006 and is reproduced herein at App. B.

JURISDICTION

Federal jurisdiction of this action was grounded upon 28 U.S.C. § 1337 (a), it being based upon a tort, breach on contract and breach of bailment obligations and upon Rule 9 (h) , being within the Admiralty and Maritime jurisdiction of the Court. The Judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered July 16, 2007. Plaintiff-Appellant timely filed a Petition for a Rehearing *En Banc* which was denied on August 28, 2007. This Petition is timely under 28 U.S.C. § 2101 (c) and under Supreme Court Rule 13 because it is being filed within 90 days of the denial of rehearing. This Court has jurisdiction to review the judgment of The United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254 (1)

STATEMENT OF THE CASE

In January, 2004 Trafigura Beheer B.V. ("Trafigura") shipped a cargo of naphtha, which was loaded in six tanks, on the *M/T Probo Elk* from Algeria to The Netherlands. The shipment was carried under a charter party and "clean" bill of lading. Further, the cargo had been sampled prior to loading and found free of contamination. The charter party stated that the charter's "performance" was to be governed by "English Law" and contained a clause granting jurisdiction for "any dispute which may arise out of this charter" to "The High Court of London." The operative bill of lading did not specifically incorporate the forum selection clause of the charter party nor even mention it but merely, generically stated that all terms of the charter party applied.

Upon arrival in The Netherlands the naphtha in three of the ship's tanks was found to be contaminated and the prospective buyer rejected the shipment. *Because the charter party in question only governed transportation from Algeria to Rotterdam, a new agreement between Trafigura and the ship owner, Probo Elk Shipping/Laurin Tankers Americas, Inc. (Probo/Laurin) was needed.* Eventually, Trafigura found a buyer in Point Comfort, Texas who would pay more for the cargo (even with its contamination) than the original Dutch buyer and Trafigura and Probo/Laurin verbally agreed to a new *and higher freight rate* for further transportation to Houston. *There was no charter party entered into for the transportation to Houston.* The original charter party, which by its own terms only governed transportation from Algeria to Holland, had no operative provision

for the on carriage to Houston and thus no applicable freight rate. Under the terms of the original charter, the ship could have discharged the cargo in Holland and forced Trafigura to obtain a new vessel. Why this was not done is unknown to Trafigura, *but the on carriage on the Probo Elk had the same effect as the employment of a new ship.*

When the *Probo Elk* arrived in Houston, a threat was made to arrest the vessel to obtain security for the costs of the on carriage, which became the *sole* claim in the action in the Houston District Court. In response, the ship's insurer offered a Letter of Undertaking which was accepted by Trafigura. The Letter was not a traditional Letter in that it did not reserve "all defenses and objections" but specifically reserved "all *other* defenses and objections". The use of the word "other" is highly unusual and since an arrest in Houston is not a "defense", no other conclusion can be drawn other than that the use if the word "other" signified an *agreement* to Houston jurisdiction. In pertinent part, the Letter of Undertaking states:

> 1. To file or cause to file on your demand an appearance on behalf of the *M/T Probo Elk, in rem,* and a claim of owner to that vessel in a suit in the United States District Court for the Southern District of Texas, Houston Division.
>
> 2. To satisfy any final decree of the United States District Court for the Southern District of Texas, Houston Division or any settlement up to the sum of $775,000.

The letter also provided:

> "It is further intended by this undertaking that the rights of Trafigura Beheer BV Amsterdam and of the *M/T Probo Elk* and her claimant be, and for all purposes shall be taken to be, consistent with the *M/T Probo Elk* having been arrested under process issued out of the United States District Court for the Southern District of Texas, at Houston and released by the filing of a release bond, *reservation being made on behalf of the M/T Probo Elk and her claimant of all other defenses and objections otherwise available* ....."

Trafigura instituted suit in January, 2005 and the Defendants answered in February raising, for the first time, the defense of the forum selection clause of the inoperable charter party. No mention of the foreign forum was made in the Letter of Undertaking. The case was then litigated in the District Court until its order of dismissal in May 2006. Along the way, the District Court ordered the Defendants to produce the first foot loading samples of the naphtha which had been taken for the ship at loading in Algeria and surrounding documentation. The Defendants had refused to produce these. When this Order was issued, the Defendants moved for the dismissal. The samples proved that the contamination occurred on board the ship and the ship's insurers, which issued the Letter of Undertaking, had instructed the ship's surveyor, *in writing, to tell Trafigura's surveyor that the samples were "unavailable"*. Trafigura only discovered the existence of the samples when an

agent heard about them, by chance, during discharge of the subject cargo in Houston.

Point I

The Court Of Appeals, In Affirming The Dismissal Of The Case By Reason Of A Forum Selection Clause In The Original Charter Party, Completely Ignored The Unique Language Of The Letter Of Undertaking Which Conferred Jurisdiction On The District Court In Houston

It is well settled, in admiralty, that the issuance of a Letter of Undertaking *in lieu* of arrest of a vessel confers In *Rem* jurisdiction just as though the vessel had been arrested. *Continental Grain Co. v. Federal Barge Lines, Inc.*, 364 U.S. 19, 21-23 (1959); *Panaconti Shipping Co., S.A. v. M/V Ypanpanti*,865 F. 2d 705 (5th Cir. 1989).

It is also well settled law that parties are free to contract new agreements, or modify existing ones, and that any modifications to existing contracts supersede an earlier version of agreement to the extent of any inconsistencies. *Carolina Metal Products Corp. v. Robert Larson & Flame Foil, Inc.*, 389 F. 2d 490, 494 (5th Cir. 1994); *Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, 390 F. 3d 336,342 (5th Cir. 2004); *Restatement (Second) of Contracts* § 213 (1981).

Thus, the issue is whether the subsequent Letter of Undertaking constituted a new or modified agreement regarding jurisdiction with respect to the

earlier charter party forum selection clause. An analysis of the plain language of the Letter of Undertaking clearly shows that it did. In pertinent part, the Letter states:

> "It is further intended by this undertaking that the rights of Trafigura Beheer BV Amsterdam and the *M/T Probo Elk* and her claimant be, and for all purposes shall be taken to be, consistent with the *M/T Probo Elk* having been arrested under process issued out of the United States District Court for the Southern District of Texas at Houston and released by the filing of a release bond, reservation being made on behalf of the *M/T Probo Elk* and her claimant *of all other defenses and objections otherwise available* ....."

Since the arrest of *M/T Probo Elk* and her release would not be a *defense* to the lawsuit in Houston, the only conclusion that makes sense of why the words "other defenses" were used in the Letter is that the defense of lack of jurisdiction of the District Court (which is an actual one and which was asserted, for the first time, in the Answer) was waived. *Most importantly, as argued before the Fifth Circuit, this conclusion was agreed to by defense counsel who drafted the Letter of Undertaking.* At pages 24 and 25 of the Appeal Brief, defense counsel stated:

> *"The use of the word "other" modifies "consistent with the M/T Probo Elk having been arrested under process", meaning that Probo as Claimant retained all defenses*

> *available except those that are foreclosed by the actual arrest of the vessel, such as contesting in rem jurisdiction."*

This *admission* of the *in rem* jurisdiction of the District Court, which is the only interpretation of the word "other" that makes sense, was completely ignored by the Fifth Circuit. Also importantly, the subject Letter of Undertaking is the only one reported containing the words "other defenses."

Since the Defendants admit that the Letter of Undertaking conferred jurisdiction on the District Court, the High Court in London no longer had jurisdiction. Thus, the Dismissal was plainly wrong.

Merely as a point of interest, even though a letter of Undertaking is one of the most important tools in obtaining security and jurisdiction for admiralty actions, preventing costly and time consuming arrests of ships, one of the Fifth Circuit Judges during oral argument seemed to confuse the primary jurisdictional issue with venue. The Dismissal was not for improper venue, but rather for lack of jurisdiction. If venue was the issue, the District Court would have retained the action and security awaiting the acceptance of venue by the transferee court.

Point II

The Court Of Appeals, In Affirming The Dismissal Of The Case By Reason Of The Foreign Forum Selection Clause In The Charter Party, Wrongfully And Completely Ignored The Fact That The Charter Party Had Ceased To Exist When The Vessel Was In Houston And The Letter Of Undertaking Was Issued.

One of the primary arguments made by Trafigura, both in the District Court and on Appeal, is that the charter party ceased to exist and was not operative for the voyage from Holland to Houston. Despite the fact that the Appellate Judges seemed to agree with Trafigura on this issue during oral argument, neither the Fifth Circuit, in its unreported decision, nor the District Court, commented upon this assertion.

The plain fact is that the charter, by and of its own terms, only governed transportation from Algeria to Holland. It contained no operative agreement for the on carriage to Houston. The suit in Houston was solely for the cost of the on carriage, not for the damage to the cargo. While it could be argued that the on carriage resulted from the contamination to the cargo which occurred during the charter party governed carriage, the on carriage and its freight was not provided for in the charter party which only governed transportation from Algeria to Rotterdam. Trafigura believes that this is the reason that the foreign forum selection clause was not preserved as a defense in the Letter of Undertaking.

All charter parties have limits of applicability. The subject charter party, by its own terms, was limited in scope to the carriage of the cargo from Algeria to Holland. It contained no operative provision regarding any on carriage. Further, the charter was not extended to the on carriage to Houston. Even the Defendants do not assert this. The freight rate paid for the on carriage was different than that specified in the charter agreement as was the Port of discharge, Houston. In effect, the parties had entered into a new agreement, one that was orally agreed, to transport the shipment to Houston. Since the original charter was dead, any attempt to assert the jurisdiction of the High Court in London could only be effected by a new agreement, which was not done. Additionally, since the original charter was dead, so was its foreign forum selection clause. This was a major argument pressed by Trafigura in both the District and Appellate Courts. It was essentially ignored. While it could be argued that the on carriage was the result of the contamination of the cargo which occurred under the original charter party, the suit was for the cost of the on carriage, not for the contamination. *These costs, of necessity and in fact, were not included in the original charter.* Further, the original charter party, as do all such charters, not only provided that its scope was limited to carriage from Algeria to Holland, but also that the owner had the exclusive *right* to discharge the cargo in Holland. The charter party was merely a time charter and normally ships such as the Probo Elk are time chartered for several successive voyages in advance. Trafigura does not know why the shipowner decided to on carry the cargo, but the legal effect was the same as if a new ship had been chartered for a voyage to Houston. Thus, it was

clearly wrong for the Fifth Circuit to ignore this fact. The unreported Appellate opinion is puzzling since the Appellate Judges seemed to agree, during oral argument, that a new agreement had been reached.

It is well established law that the language of any contract, including a charter, is to be construed to give effect to the plain meaning of the words used. *Cappozziello v. Brasileiro,* 448 F. 2d 1155, 1159 (2d Cir. 1971); *Navieros Oceanikos S.A. v. S.T. Mobil Trader*, 554 F. 2d 43 (2d Cir. 1977). The subject charter, like all time or voyage charters, was limited in scope to the loading port in Algeria, the discharge port in Holland and the voyage in between.

Point III

The Fifth Circuit, In Affirming The Dismissal, Refused To Consider English Law, Which Was Relied Upon By The Defendants, Because Trafigura Did Not Raise The Issue Until Appeal. Such A Refusal Was Incorrect Since A Court May Consider An Issue At Any Time Whether Raised By A Party Or *Sua Sponte* By The Court.

Clause 55 of the original charter party, drafted by, and relied on, by the Defendants, stated that English Law would govern the "construction, validity and performance" of the charter party. English Law, as Trafigura briefed and argued on Appeal, states that unless the forum selection clause is specifically mentioned in the bill of lading, the clause will have no effect. Thus, with the District Court declining

jurisdiction and the English Court having none, there was no forum for the case.

English Law requires any arbitration or forum selection clause in a charter party to be set forth by "distinct and specific" words in a bill of lading and not by general wording. *Federal Bulk Carriers Inc. v. C. Itoh & Co. Ltd. and Others*, [1989] 1 Lloyd's Reports 103 (Court of Appeals 1988); *Daval Aciers D'Usinor Et De Sacilor and Others v. Amare SRL*, [1966] 1 Lloyd's Reports 1 (Court of Appeals 1996); *Navigazione Alta Italia SPA v. Svenska Petroleum AB*, [1988] 1 Lloyd's Reports 452 (Queen's Bench 1987). The subject bill of lading merely and inadequately stated:

> "....which shall be delivered in like good order and condition at the port of ROTTERDAM... in accordance with conditions laid down in the ship's charter party."

We know of no precedent that holds that a Court should or must not consider a point of law unless it is raised before appeal. This is especially so where the raising of a point of law does not prejudice the other parties which here, had a chance to brief and argue a response. Such a rule is dangerous since it impliedly empowers counsel to determine what a Court can or cannot consider.

CONCLUSION

It Is Respectfully Requested That The Unreported Decision Of The Fifth Circuit Court Of Appeals Be Reversed And That The Case Be Remanded To The District Court In Houston For Further Proceedings. This is Especially Warranted Where As Set Forth Herein, The Defendants Have Conceded That The District Court Has Jurisdiction.

Respectfully Submitted,

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APPENDIX

Appendix A

In The

United States Court of Appeals

for the Fifth Circuit

M 06-20576

Trafigura Beheer B.V.,

Plaintiff-Appellant,

Versus

M/T Probo Elk,
Her Engines, Tackle, Apparel, etc., In Rem,
Probo Elk Shipping Inc.,
Laurin Tankers America Inc.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
m. 4:05-CV-378

Before Smith, Benavides and Dennis, Circuit Judges.

PER CURIAM: *

Trafigura Beheer B.V. ("Trafigura") appeals a dismissal based on improper venue. Finding no error, we affirm.

Trafigura contracted with defendants Probo Elk Shipping Inc. and Lauren Tankers America Inc. to transport a shipment of naphtha from Algeria to the Netherlands aboard the M/T PROBO ELK. The charter party contained a forum selection clause stating that "[t]he High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this charter." According to Trafigura, the naphtha was in good condition when it was loaded onto the PROBO ELK in Algeria, but when it arrived in the Netherlands the intended buyer rejected it for contamination. Trafigura eventually located another buyer in the United States and arranged for the defendants to deliver the naphtha to Houston.

Once the shipment arrived in Texas, Trafigura threatened to arrest the ship and assert jurisdiction *in rem*. It sued in the Southern District of Texas, claiming breach of bailment, and negligence related to the contamination of the naphtha. To avoid arrest of the PROBO ELK, the ship's underwriters entered

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4.

into a letter of undertaking ("LOU"), agreeing to appear as claimants in the suit and pay any final judgment up to $ 775,000. The LOU did not purport to supersede the original agreement and expressly reserved all defenses.[1]

Defendants successfully moved to dismiss for improper venue based on the charter party's forum selection clause. Trafigura raises three issues on appeal. First, it claims the LOU superseded the forum selection clause. Second, even if it was not superseded, enforcement of the forum selection clause would be unjust and unreasonable. Third, defendants waived the forum selection clause issue by failing to make a timely pre-answer motion.

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[1] The LOU stated *inter alia*, as follows: It is further intended by this undertaking that the rights of Trafigura Beheer BV Amsterdam and the M/T PROBO ELK and her claimant be, and for all purposes shall be taken to be, consistent with the M/T PROBO ELK having been arrested under process issued out of the United States District Court for the Southern District of Texas at Houston and released by the filing of a release bond, reservation being made on behalf of M/T PROBO ELK and her claimant of all other defenses and objections otherwise available, including but not limited to limitation of or exoneration from liability, arbitration and/or the right to counter security, except as may be predicated on the fact that the vessel was released on the basis of this undertaking rather than on the posting of a release bond.

II.

We review the enforcement of a forum selection clause *de novo*. *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F. 3d 514, 517 (5th Cir. 2006). Forum selection clauses are presumptively enforceable under federal law in the" interests of international comity and out of deference to the integrity and proficiency of foreign courts." *Haynesworth v. The Corporation*, 121 F. 3d 956, 962 (5th Cir. 1997) (quoting *Mitsui & Co. (U.S.A.), Inc. v. MIRA M/V*, 111 F. 3d 33, 35 (5th Cir. 1997).[2] Trafigura claims that the LOU superseded the charter party's forum selection clause because the defendants agreed to appear as claimants and pay a judgment of up to $ 775,000 if ordered. Trafigura thus asserts that defendants were waiving the forum selection clause issue by agreeing to the Southern District of Texas as an appropriate venue and that the LOU reserved only "all other defenses" available to them. That argument conflates jurisdiction and venue.

Defendants submitted to the court's jurisdiction by virtue of the LOU, which specifically established that jurisdiction would exist in the same manner as if the ship had been arrested and defendants had appeared as claimants. But a party's mere appearance as a

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[2] Trafigura argues that *Haynesworth* is inapplicable because it is not an admiralty case and did not involve an LOU. *Haynesworth*, however, relied extensively on admiralty cases such as *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and Mitsui and held that the rules of these cases, which are plainly applicable to other admiralty cases, are also applicable outside the admiralty context. See *Haynesworth, 121 F. 3d at 962*

claimant does not waive venue. *See The Bremen*, 407 U.S. at 20. As the court explained in *The Bremen*, the "jurisdictional" language of the forum selection clause does not oust the personal or in rem jurisdiction of the American courts. The parties may not *a priori* restrict the court's statutorily established basic power to assert jurisdiction by their mutual consent. It only renders it legally improper for the American court to do more with its jurisdiction than to evaluate the forum selection clause's enforceability. If the clause is enforceable, the court must dismiss the case because the United States is an improper forum. *Id* at 12.

Accordingly, the language of the LOU was entirely consistent with the charter party's forum selection clause and did not supersede it. Rather, the claimants properly appeared before the district court as if their ship had been arrested, and the court properly dismissed for improper venue after finding that the forum selection clause was enforceable.[3]

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[3]Trafigura filed a supplemental brief arguing for the first time that, under British law, the forum selection clause was never incorporated into the bill of lading and thus was not part of the contract. Because it did not prove the content of British law in the district court, these arguments are waived, and we do not consider them. *See* FED.R. CIV. P. 44.1; *Banque Libanaise pour le Commerce v. Khreich*, 915 F. 2d 1000, 1006 (5th Cir. 1990).

III

Trafigura argues that even if the charter party was not superseded, enforcement of the forum selection clause is unjust and unreasonable. *See id* at 15. A forum selection clause should not be enforced if the clause was the product of fraud or overreaching; if the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; or if enforcement of the clause would contravene a strong public policy of the forum state. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 595 (1991); *The Bremen*, 407 U.S. at 15, 18. None of these circumstances exists here.

Trafigura contends that dismissal was unfair because under British law, its claim would be time barred in London. But Trafigura's failure to plead and prove foreign law below is fatal to its claim. *See Banque Libanaise*, 915 F. 2d at 1006. Even if were not the case, Trafigura's claim would fail. It alleges that Britain imposes a one year statute of limitations; the same limitations that apply in the United States. Trafigura filed this suit in Houston two days before the American statute of limitations, alleged to be identical to the British one would have run. It is thus disingenuous for Trafigura to accuse defendants of delaying so as to deny it a forum; defendants cannot have been expected to file their answer within two days. Trafigura occasioned its own predicament by failing timely to file its claim in the contractually specified forum; no policy against unfairness counsels in favor of rewarding such behavior by adjudicating

this case in a forum that would otherwise be contractually barred. [4]

London was otherwise a reasonable forum. Trafigura has an office there, so it was not inconvenient. Further, British courts have a long history of fair and impartial admiralty jurisprudence. *The Bremen*, 407 U.S. at 17. In sum, it was fair and reasonable for the court to enforce the forum selection clause.

IV

Trafigura claims defendants waived the forum selection clause by failing to make a timely pre-answer motion. We review a district court's interpretation of the federal rules of civil procedure *de novo*. *Knight v. Kirby Inland Marine, Inc.*, 482 F. 3d 347, 355 (5th Cir. 2007).

Trafigura cites Federal Rule of Civil Procedure 12(b) in support of this argument; that rule states that:

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[4] *See New Moon Shipping Co. v. Man B&W Diesel AG*, 121 F.3d 24, 32 (2d Cir. 1997) ("[C]onsideration of a statute of limitations would create a large loophole for the party seeking to avoid enforcement of the forum selection clause. That party could simply postpone its cause of action until the statute of limitations has run in the chosen forum and then file its action in a more convenient forum."); *Union Steel Am. Co. v. M/V SANKO SPRUCE*, 14 F. Supp. 2d 682, 696 (D. N.J.1998) (stating that unreasonableness "does not hinge on whether a clause is unreasonable in light of present circumstances created by plaintiff's failure to file in the correct forum.".)

> [e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may *at the option of the pleader* be made by motion.....
> (3) improper venue.....

(emphasis added.)

Defendants complied with this rule by raising their objections to the forum in their answer, which was their first responsive pleading to the complaint.[5] They then objected to all discovery and refused to participate until they were compelled to do so by the magistrate judge while their motion to dismiss was pending.

Although it was some months before defendants filed their motion to dismiss based on rule 12 (b)(3) and (6), that delay appears to have resulted from the fact that Trafigura, the plaintiff, had failed to prosecute the case. Trafigura did not make any

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[5] *See Jockey Int'l Inc. v. M/V LEVERKUSEN EXPRESS*, 217 F. Supp. 2d 447, 455 (S.D.N.Y. 2002) (finding that after defendants had raised forum selection clause in their answer, "[a] delay of six to seven months in lodging that challenge [to enforce the clause] is not inordinate, particularly given that discovery was not even completed at the time the motion was filed"); *Queen Noor, Inc. v. McGinn*, 578 F. Supp. 218, 219 (S.D. Tex. 1984) (holding that the assertion of a forum selection clause in an answer is sufficient to preserve the defense).

discovery requests until August 12, approximately six months after filing its complaint. On September 14 defendants objected to discovery based on improper venue; they moved to dismiss on October 25.

Although we review the court's interpretation of the federal rules *de novo*, we held, in a similar case, that arbitrability " depends on the circumstances of each case and usually must be determined by the trier of facts." *Valero Refining, Inc. v. M/T LAUBERHORN*, 813 F. 2d 60, 65 (5th Cir. 1987). There the defendant's analogous minimal participation in discovery did not result in waiver of arbitrability, and we see no reason to upset the district court's determination in the present case. *See id at 66; see also Tenneco Resins, Inc. v. Davy Int'l. AG*, 770 F.2d 416, 421 (5t h Cir. 1985). Trafigura can hardly be said to have been blindsided by the assertion of improper venue, defendants had requested no discovery, and Trafigura had not been put to any great litigation expense in the Southern District of Texas at the time of the motion.[6]

AFFIRMED

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[6]*Compare In Re Deleas Shipping Ltd.* 1996 A.M.C. 434 (W.D. Wash. 1995) (reasoning that a party waives its right to the benefit of a forum selection clause where it "has taken actions inconsistent with it, or delayed its enforcement, and other parties would be prejudiced") (citing *Lake Commc'ns Inc. v. ICC Corp.* 738 F.2d 1473, 1477 (9th Cir. 1984).

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRAFIGURA BEHEER B.V.,	:	
Plaintiff,	:	CIVIL ACTION NO. H-05-378
vs.	:	
M/T PROBO ELK, *et al,*	:	
Defendant		

MEMORANDUM OPINION AND ORDER

Presiding before the court is Defendants' motion to dismiss based on forum selection clause (Instrument No. 13).

For the following reasons the court ORDERS that the Motion is GRANTED.

I. RELEVANT FACTS

This case arises out of the shipment 32,987,424 metric tons of naphtha from the Port of Skikda, Algeria, to Rotterdam, The Netherlands. Plaintiff Trafigura Beheer B.V. ("Trafigura") was the owner and shipper of the naphtha. The naphtha was transported aboard the M/T Probo Elk pursuant to a charter party entered into between Trafigura and Defendants Probo Elk Shipping ("Probo") and Laurin Tankers America Inc. ("Laurin"). The charter party Incorporates the BEEPEEVOY 3 charter party form. See Fixture (Instrument No. 13, Ex.1). Clause 55 (the "Forum Selection Clause") of the BEEPEEVOY 3

charter party form provides in relevant part "[T]he High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter." See BEEPEEVOY 3 Form, Clause 55 (Instrument No. 13, Ex. 2).

According to Trafigura, the naphtha was loaded onto The M/T Probo Elk in good condition. However, when the ship arrived in Rotterdam the naphtha was discovered to be contaminated. The intended buyer, Shell Nederland Raffnaderij B.V., rejected the shipment, and Trafigura was forced to search for an alternate buyer. Eventually a New Jersey company purchased the naphtha, taking delivery in Houston, Texas. The naphtha was transported to the United States by Defendants.

Trafigura filed its Original Complaint with this Court on 4 February 2005, claiming breach of contract, breach of bailment, and negligence related to the contamination of the naphtha. Trafigura seeks $ 775,000 in damages. To avoid the arrest of the vessel, defendants entered into a Letter of Undertaking with Plaintiff. See Letter of Understanding (Instrument No. 14, Ex.A).

II. APPLICATION OF LAW TO THE FACTS

It is well settled that "federal courts must presumptively enforce forum selection clauses in international transactions" Haynsworth v. The Corporation, 121 F. 3d 956,962 (5th Cir. 1997) (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). In this case, Trafigura's cause of action arises out of the charter party between it and the Defendants, making it subject to the forum selection clause contained in the BEEPEEVOY 3 contract.

Trafigura makes two arguments against enforcing the forum selection clause. First, it argues that the forum selection clause applies only to the naphtha's shipment from Skikda to Rotterdam and not its shipment from Rotterdam to the United States. Resp. at 4 (Instrument 14). Whether this is the case is irrelevant. Trafigura's complaint seeks to recover for events occurring during the naphtha's shipment from Skikda to Rotterdam, a period covered by the charter party. Trafigura's second argument is that the forum selection clause has been superseded by the Letter of Undertaking. This suggestion is belied by the Letter of Undertaking, which does not purport to supersede the parties' original agreement and expressly reserves all defenses[1].

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[1]The letter of undertaking contains the following language:

It is further intended by this undertaking that the rights of Trafigura Beheer BV Amsterdam And of the M/T PROBO ELK and her claimant be, and for all purposes shall be taken to be, consistent with the M/T PROBO ELK having been arrested under process issued out of the United States District Court for the Southern District of Texas at Houston and released by the filing of a release bond, reservation being made on behalf of M/T PROBO ELK and her claimant of all other defenses and objections otherwise available, including but not limited to limitation of or exoneration from liability, arbitration and/or the right to counter security, except as may be predicated on the fact that the vessel was released on the basis of this undertaking rather than on posting of a release bond. Letter of Undertaking at 2 (Instrument 14, Ex. A).

III. CONCLUSION

For the aforementioned reasons, the court ORDERS that Defendants' motion (Instrument No. 13) is GRANTED.

Signed at Houston, Texas, this 2nd day of May, 2006.

s/Melinda Harmon

Melinda Harmon
United States District Judge

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20576

Trafugura Beheer B.V.,

Plaintiff-Appellant,

v.

U.S. Ct. of Appeals
FILED
August 28, 2007

M/T Probo Elk, her engines,
tackle, apparel, etc.
in rem; Probo Elk Shipping Inc; Laurin Tankers
America, Inc.

Defendants-Appellees

Appeal from the United States District Court for
The Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 7/16/07, 5 Cir.,_____, _____F. 3d_____

Before Judges SMITH, BENAVIDES, and DENNIS, Circuit Judge.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the Panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(Fed. R. App. P. and 5th Cir. R 35), the Petition for Rehearing En Banc is DENIED.

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of our members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/ J. SMITH
United States Circuit Judge

79

No. 07-712

FILED
DEC 31 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

TRAFIGURA BEHEER B.V.,

Petitioner,

v.

M/T PROBO ELK, HER ENGINES, TACKLE, APPAREL, etc., IN REM, PROBO ELK SHIPPING INC., LAURIN TANKERS AMERICA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Laurin Tankers America, Inc. is a subsidiary of Laurin Maritime (America) Inc. Both entities are privately held companies. Respondent Probo Elk Shipping Inc. is also a privately held company.

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JURISDICTION

Respondents deny that original federal jurisdiction of this matter was based on 28 U.S.C. § 1337(a). This is an admiralty and maritime matter arising under 28 U.S.C. § 1333(1).

CORRECTIONS TO PETITIONER'S STATEMENT OF THE CASE

This is a very simple matter concerning Petitioner's alleged damages arising from the ocean carriage of a naphtha cargo from Skikda, Algeria to Rotterdam, The Netherlands aboard the M/T PROBO ELK. When the PROBO ELK arrived in Rotterdam, Petitioner claimed that some of the cargo was contaminated and, pursuant to Petitioner's obligation to mitigate its alleged damages, Petitioner arranged for an alternative buyer in Houston, Texas, USA. The PROBO ELK undertook this further carriage, and the cargo was discharged in Houston. While the PROBO ELK was in Houston, Petitioner threatened to arrest it unless a Letter of Undertaking ("LOU") was issued. The LOU was issued and later became the source of Petitioner's objection to the District Court's enforcement of a contractual forum selection clause. Although it is clear that the lower courts properly found the forum selection clause enforceable and that Petitioner has not remotely raised proper issues for granting its Petition for Writ of Certiorari, Respondents provide the following corrections of Petitioner's

misstatements of fact and of the record and do not waive any further objection to them.

1. There is no evidence in the record supporting Petitioner's claim that the cargo was contaminated, much less contaminated during the PROBO ELK carriage.

2. Petitioner's claim has always been for damages it claims arose from the cargo's alleged contamination during the voyage from Skikda to Rotterdam. Only after Respondents attempted to enforce the forum selection clause in the Charter Party did Petitioner suddenly assert that the "claim" was for the voyage itself between Rotterdam and Houston. This, of course, confuses a cause of action with resulting damages. There is no allegation here that the cargo became further contaminated on the mitigation voyage. Petitioner's "claim" is simply for the extra freight between Rotterdam and Houston, which is an expense or damage arising out of the contamination allegedly sustained between Skikda and Rotterdam. As Petitioner pled in its Original Complaint, the extended carriage was "a direct result of the contamination to the subject shipment of naphtha while on board the M/T Probo Elk." (R. Tab 1, p. 8-9, ¶ 8).

3. Although Petitioner now claims that the LOU was issued solely as to the extended carriage to Houston, the language of the LOU explicitly refutes such a contention; the LOU was issued

> in order to obtain security for the claim which is or may be asserted by Trafigura Beheer

> BV Amsterdam in relation to a cargo of Naphtha carried aboard the M/T PROBO ELK under a bill of lading issued on January 7, 2004 at Skikda, Algeria . . .

Petitioner explicitly accepted this language at the time the LOU was issued and has never voiced any objection to it, even now.

4. Petitioner has misrepresented the procedural history of the litigation in the District Court. After failing to provide Respondents with a claim statement for over six months (not including the year between the alleged incident and Petitioner's filing of suit), Respondents advised Petitioner that they would be proceeding with a Motion to Dismiss. Petitioner's only response was to serve Respondents with discovery requests and Initial Disclosures. Respondents then promptly moved for dismissal as well as served their discovery responses expressly subject to their rights to dismissal. There was no Order issued against Respondents regarding discovery production until Petitioner began filing multiple motions to compel (*after* Respondents filed their Motion to Dismiss Based on Forum Selection Clause), claiming that Respondents were intentionally "obfuscating" the discovery process. Respondents were then ordered to participate in discovery on the merits despite their pending Motion to Dismiss Based on Forum Selection Clause. Petitioner's characterizations of the docket are clearly disingenuous given its other, completely contrary allegations that Respondents were "pointedly participating" in discovery (asserted by Petitioner as a

basis for prejudice to support non-enforcement of the forum selection clause). Such mischaracterizations by Petitioner have been commonplace throughout this litigation and appeal.

RESPONSE TO POINT 1: THIS WAS A DISMISSAL FOR IMPROPER VENUE, NOT LACK OF JURISDICTION

Petitioner continues to confuse jurisdiction with venue. At no time during the litigation did Respondents move for dismissal for lack of jurisdiction. Respondents moved for dismissal expressly pursuant to Federal Rules of Civil Procedure 12(b)(3) (venue) and 12(b)(6) (failure to state a claim) and 28 U.S.C. § 1406 (cure of venue defects). (R. Tab 13, p. 71, ¶ 7). The dismissal was not based on Federal Rule of Civil Procedure 12(b)(1) (subject matter jurisdiction) or 12(b)(2) (personal jurisdiction). Thus, any of Petitioner's arguments regarding waiver or admission of jurisdiction are inapposite. As Respondents have previously briefed, they did not and do not contest that *in rem* jurisdiction was established over the vessel PROBO ELK just as if the vessel had been arrested, saving any other available defenses. Respondents moved for dismissal based on improper venue, a Motion to Dismiss Based on Forum Selection Clause is properly brought as an objection to improper venue (*Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005)), and the District Court properly dismissed Petitioner's claims

in favor of the proper agreed venue in London. On appeal, the Court of Appeals for the Fifth Circuit expressly addressed Petitioner's mistaken 'conflation' of jurisdiction and venue. Appearance as a Claimant on behalf of a vessel *in rem* does not waive objections to venue. *Trafigura Beheer B.V. v. M/T PROBO ELK*, 2007 WL 2033336, *1 (5th Cir. 2007). Respondents expressly reserved their objections to improper venue in their Original Answer and timely moved for dismissal based on the agreed forum selection clause.[1]

RESPONSE TO POINT 2: THERE WAS NO PHANTOM CHARTER PARTY; THE ORIGINAL CHARTER PARTY CONTROLLED THE MITIGATION CARRIAGE

There is no evidence in the record that Petitioner and Respondents executed a new and apparently verbal Charter Party for the on-carriage to Houston. The mitigation carriage to Houston was simply an extension of the original freight from Skikda, and the same contractual terms (many of which were supplied by Petitioner as part of its standard terms) applied. Petitioner's claim that there were no concrete contractual terms for the extended carriage is contrary to Petitioner's allegations in its Original Complaint.

[1] That Petitioner failed to ask the District Court to retain the posted security pending London adjudication has no relevancy as to whether Respondents' motion to dismiss was brought as an objection to jurisdiction or an objection to venue.

Petitioner specifically pled that the Charter Party applied and included a cause of action for breach of contract. (R. Tab 1, p. 8, ¶ 5; p. 9). In its Initial Disclosures and in support of its claim, Petitioner produced a form copy of the BEEPEEVOY3 charter party form as well as the specific amendments and riders *required by Petitioner*. Petitioner is a sophisticated business entity with multiple offices around the world. It is incomprehensible that Petitioner, who uniformly requires standard amendments and riders to its charter contracts, would decide on this voyage (concerning allegedly contaminated cargo) not to use any other terms than load port, discharge port, and cargo identification. In any event, as Petitioner's claims arise out of the carriage between Skikda and Rotterdam and not Rotterdam to Houston, whether the forum selection clause at issue applied to the latter carriage is irrelevant. The forum selection clause clearly applied to the carriage between Skikda and Rotterdam, and Petitioner's claims were properly dismissed in favor of the contractually agreed forum.

RESPONSE TO POINT 3: PETITIONER WAIVED ENGLISH LAW ARGUMENT

The Court of Appeals for the Fifth Circuit correctly refused to consider Petitioner's arguments regarding English law because Petitioner failed to properly plead and prove them in the District Court. Petitioner claims that an appellate court can consider

any issue it desires at any time and that there is no precedent to the contrary. This is simply wrong. The Court of Appeals was expressly bound by Federal Rule of Civil Procedure 44.1 and the Court's prior decisions, including *Banque Libanaise* in which it held, "If the [appellant] wanted to rely on [foreign law], it was obligated to present to the district court clear proof of the relevant [foreign] legal principles." *Banque Libanaise pour le Commerce v. Khreich,* 915 F.2d 1000, 1006 (5th Cir. 1990). Petitioner failed to raise, let alone prove, English law in the District Court. English law could not have been considered by the District Court, and the Court of Appeals correctly refused to entertain Petitioner's untimely foreign law assertions.

PETITIONER HAS FAILED TO MEET THE STANDARD FOR WRIT OF CERTIORARI

Only a cursory review of the Petition for Writ of Certiorari shows that it unequivocally fails to comply with Supreme Court Rule 10 and falls far short of the threshold standard for review on Certiorari. Review on Certiorari is not a matter of right but of judicial discretion. SUPREME COURT RULE 10. This Court grants review on Certiorari only for "compelling reasons". *Id.* Corrections of erroneous factual findings or a misapplication of a properly stated rule of law are not generally considered proper for review on Certiorari. *See id.* Proper reasons may include:

(1) conflict between decisions of United States Courts of Appeals on an important matter;

(2) conflict between the decision of a United States Court of Appeal and a decision by a state court of last resort;

(3) a United States Court of Appeal's far departure from accepted and usual course of judicial proceedings (thereby warranting this Court's supervisory power);

(4) conflict between a state court of last resort's decision on an important federal question and the decision of another state court of last resort or of a United States Court of Appeals;

(5) an important question of federal law has been decided by a lower court that should be, but has not been, settled by this Court; or,

(6) conflict between the decision of a lower court on an important question of federal law with relevant decisions of this Court.

Id.

None of the above reasons are implicated or in fact even suggested. Petitioner has not identified any previous decision, whether of this Court, any United States Court of Appeals, or any state court of last resort, that conflict with the decisions of the District Court and Court of Appeals in this matter. Petitioner

further has not identified or alleged that the District Court or Court of Appeals engaged in a "far departure" from normal judicial proceedings. Finally, Petitioner has not suggested that the lower decisions contain novel and important issues of federal law that have not been but should be decided by this Court. In fact, this Court has already addressed the pertinent legal issues in the seminal decision *The BREMEN. M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Petitioner is only suggesting that the District Court made factual errors and misapplied legal standards, erroneously affirmed on appeal, which are not proper grounds for review on Certiorari. *See* SUPREME COURT RULE 10.

CONCLUSION

The issues in this matter are very simple, well settled, and do not require review on Certiorari by this Court. Petitioner's mischaracterization of the record and proceedings below cannot hide that the District Court properly enforced an agreed forum selection clause contained in a charter party and dismissed this action for improper venue. The United States Court of Appeals for the Fifth Circuit has already addressed Petitioner's continued conflation of jurisdiction and venue, the irrelevancy of whether the forum selection clause should be applied to the shipment between Rotterdam and Houston, and Petitioner's failure to properly plead and prove foreign law. Having failed to articulate how the Fifth

Circuit's decision is in conflict with any other as required by Supreme Court Rule 10, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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